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Memorandum in Opposition to Defendant's Motion for Leave to File Amended Answer

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CUYAHOGA COUNTY, OHIO

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ALAN J. DAVIS, Special Administrator of the Estate of SAMUEL H. SHEPPARD Plaintiff -vs- STATE OF OHIO Defendant	CASE NO. 312322 JUDGE RONALD SUSTER **MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER**

Plaintiff, by and through undersigned counsel, hereby submits the attached Memorandum in Opposition to the State's Motion for Leave to File Amended Answer, filed on or about March 12, 1999. The reasons and authorities for denying the State's Motion are set forth in the attached Memorandum, which is hereby incorporated herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Opposition to Defendant's Motion for Leave to File Amended Answer has been hand-delivered, this 23 day of April, 1999, to Marilyn Cassidy, Esq., Assistant Prosecuting Attorney, at her office, 1200 Ontario Street, Cleveland, Ohio 44113.

Terry H. Gilbert

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Attorneys for Plaintiff

MEMORANDUM IN OPPOSITION

I. Introduction

The instant action was originally filed on October 19, 1995, as a motion in the criminal case of State v. Sheppard, seeking a declaration that the Defendant was a wrongfully imprisoned individual. On July 24, 1996, the action was re-filed as a civil petition, with the present caption. On February 28, 1997, following denial of its Motion to Dismiss, the State filed an Answer. Shortly thereafter, in June 1997, the State filed a Petition for Writ of Prohibition in the Ohio Supreme Court. The Supreme Court considered the State's Petition for over a year, from June, 1997 through December, 1998, before ruling that the State had improperly brought the action.

Now, on March 10, 1999, the State has sought leave to amend its Answer, only six months prior to the *third* scheduled trial date in this matter, based on the strategy preference of a newly appointed County Prosecutor. The State's Motion for Leave should be denied for three reasons: (1) a jury is not available in this matter; (2) even if the State is entitled to a jury in this matter, it would be an abuse of discretion to grant the State's motion this late in litigation; and (3) the State has failed to show that justice would be furthered by the granting of its motion.

II. The State Is Not Entitled to a Jury in this Matter

First, the State is not entitled to a jury in this action. The State's historical analysis begins with a false premise: that the State has the right to a jury trial. It is settled law that Article I, §5 of the Ohio Constitution only protects the right to a jury trial as it existed in 1851, long before the State had waived its sovereign immunity. See, Sorrell v. Thevenir,

69 Ohio St.3d 415, 633 N.E.2d 504 (1994); Belding v. State ex rel. Heifner, 121 Ohio St. 393, 169 N.E. 301 (1929). Thus, the State has no right to a jury trial that was broadened by the passage of Ohio Revised Code §2311.04 or the Court of Claims Act.

Furthermore, the State completely ignores the historical context of wrongful imprisonment claims. Before the enactment of the statutory action used here, contained in Ohio Revised Code §§2305.02 and 2743.48, aggrieved persons seeking relief for wrongful imprisonment had only legislative redress. Such individuals were forced to find a state legislator friendly to their cause, and were forced to petition the entire General Assembly for a special appropriation of funds directly to them, a proceeding that bears no resemblance to a jury trial. See, Walden v. State, 47 Ohio St.3d 47, 49-50, 547 N.E.2d 962, 964-65 (1989) (describing the history of "*ad hoc* moral claims legislation"). Instead of supporting the State's theory that it is historically entitled to a jury trial, the true historical background of claims like Plaintiff's is that no jury was ever involved.

For the same reasons, the State's reference to Ohio Revised Code §2311.04, allowing for juries in all suits for money damages, is inapposite. Since no jury is available in the Court of Claims, where this action is tried for purposes of damages, the case at bar is more akin to a declaratory judgment proceeding, where no party is entitled to a jury, rather than the money damages case the State asserts it is.[1] Furthermore, the trial court here, sitting with or without a jury, does not set damages; it only determines whether

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[1] The Court of Claims has limited authority in setting forth damages, based upon specific liquidated damages stated in the statute. Unlike traditional liability cases, the wrongful imprisonment statute involves little or no discretion on the question of compensation. Ohio Revised Code §2723.48.

Plaintiff's decedent was wrongfully imprisoned. Thus, Ohio Revised Code §2311.04 does not apply, contrary to the State's assertions.

In an effort to overcome these basic faults in its argument, the State improperly seeks to analogize the case at bar to a false imprisonment claim, citing Smith v. Wait, 46 Ohio App.2d 281, 350 N.E.2d 431 (1975), and Bennett v. Ohio Dept. of Rehabilitation and Correction, 60 Ohio St.3d 107, 573 N.E.2d 633 (1991). However, this analogy has already been rejected by the Ohio Supreme Court. See, Walden, 47 Ohio St.3d at 53, 547 N.E.2d at 967-68 (holding that the statutory wrongful-imprisonment action "has no parallel in the ancient dual system of law and equity").

Moreover, false imprisonment claims against the State must be brought in the Court of Claims, see Bennett, 60 Ohio St.3d at 110-11, 573 N.E.2d at 637 (allowing false imprisonment action against the State), and no jury is available in the Court of Claims. See Ohio Revised Code §2743.11 (allowing jury trials only in claims not against the State); Ohio Revised Code §2743.03(C)(1) (allowing three-judge panels in cases involving complex issues of law or fact). Thus, the State is incorrect in stretching the analogy of a false imprisonment claim to the case at bar; if the General Assembly had structured the wrongful-imprisonment statute to require the entire action to be brought in the Court of Claims, no jury would be available to either party. The General Assembly's use of local Courts of Common Pleas to make the threshold determination of whether a claimant was wrongfully imprisoned does not change this analysis: the statutory action involved here is fundamentally a proceeding against the State in the Court of Claims, with a preliminary

declaration being issued by this Court. Thus, where a jury would not be available in the Court of Claims, it should not be available here.

For all the reasons stated above, the State is not entitled to a jury in this matter, and its Motion to Amend its Answer should be denied.

III. Granting the State Leave to Amend Its Answer Would Be an Abuse of Discretion

Assuming *arguendo* that the State has the right to a jury in this matter, it has waived its right by waiting over two years to assert it. Failure to enter a jury demand within fourteen days of the close of the pleadings constitutes a waiver. See Ohio R.Civ.P. 38(D); Cassidy v. Glossip, 12 Ohio St.2d 17, 231 N.E.2d 64 (1967); City of Cincinnati v. Bossert Machine Co., 16 Ohio St.2d 76, 243 N.E.2d 105 (1968).

Seeking to revoke its waiver, the State argues that "justice requires," in the words of Ohio R.Civ.P. 15(A), that its jury demand be accepted at this late stage of the proceedings. However, in Turner v. Central Local Sch. Dist., 85 Ohio St.3d 95 (1999), the Ohio Supreme Court stated:

> The decision of whether to grant a motion for leave to amend a pleading is within the discretion of the trial court. While the rule allows for liberal amendment, motions to amend pleadings pursuant to Civ.R. 15(A) should be refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party.
> **The motion to amend was filed after a trial date was set and two years and ten months after the litigation was commenced. We find that the trial court abused its discretion in allowing this prejudicial and untimely filing.**

Turner, 85 Ohio St.3d at 99. The case at bar is precisely analogous. Here, the State has waited more than two years since litigation commenced under this case number in order

to file its motion to amend pursuant to Civ.R. 15(A). The delay since the commencement of litigation has been entirely due to the State's efforts to prevent this Court from hearing the merits of this action. Although Turner involved an amendment to add an affirmative defense, and the State here is attempting to add a jury demand, the Turner analysis still applies. A new affirmative defense creates "undue prejudice" under Turner; the State's efforts here have shown "undue delay" under Turner. If the failure to assert a jury demand for over two years does not constitute "undue delay," the Supreme Court's admonishment has no effect.

The State here has done everything it can to delay the proceedings here. It has demanded that the case be filed as a civil petition, has contested the propriety of the Plaintiff's case at every stage of litigation, and has requested an extraordinary writ that could not be granted. These actions all constitute "undue delay" for purposes of Turner. Therefore, it would be an abuse of discretion under Turner to grant the State's Motion.

IV. The State Has Failed to Show That "Justice Requires" Amendment of its Answer

Assuming *arguendo* that this Court finds that the State has a right to a jury trial in this matter, and that it may properly exercise its discretion in determining the State's Motion, the State has failed to show that "justice requires" that it be allowed to amend its Answer.

First, this case is best suited to a bench trial. As it is most closely analogous to a declaratory judgment action, the case at bar should be decided by this Court. Plaintiff contemplates the introduction of voluminous expert testimony, scientific evidence, and

documentary evidence, and the State will undoubtedly introduce similar evidence. The lengthy and complicated nature of this proceeding, with its accompanying press coverage, would be lengthened even further by the presence of a jury, and the concomitant necessity for chambers conferences, hearings out of the jury's presence, and the extensive *voir dire* necessary to ensure that no panel member has been prejudiced by the long-running press coverage of this matter.

Second, the State's assertion that the appointment of a new County Prosecutor, and his new litigation strategy, satisfies the Rule's requirement that amendment be allowed "whenever justice so requires" is unsupportable. For this Court to hold that this change in personnel serves as adequate grounds for amending pleadings filed over two years ago would allow the County to amend its pleadings in the dozens of lawsuits to which it is a party at any one time, simply by appointing a new Prosecuting Attorney. This does not promote "justice" in any sense of the word. A newly appointed attorney is always bound by the binding actions of previous counsel, such as failure to assert affirmative defenses or alternate claims. The State is as bound by this rule as any other civil litigant.

Thus, if this Court finds that it has the discretion to grant the State's motion, it should wisely exercise that discretion to deny the motion and hold the State to its original Answer. The instant action is not suited to a jury trial, based on the complexity and length of its proceedings. Rather than "justice" requiring a new Answer, justice would be furthered if this Court were to deny the State's Motion and allow a trial on the State's original Answer.

V. Conclusion

For the reasons stated herein, Plaintiff requests that this Court deny the State's Motion to Amend its Answer pursuant to Civ.R. 15(A), and instead let the matter stand for bench trial on the State's Answer as already filed.

Respectfully submitted,

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